82-1497

NO. _____

Office-Supreme Court, U.S.
FILED
FEB 17 1983
ALEXANDER L. STEVAS,
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IN THE

Supreme Court of the United States

OCTOBER TERM 1982

CARL AND RUTH BRIGGS, RAYMOND J. HURBI,
Petitioners,

v.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

ON PETITION
FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT
OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Where a union in Alaska has provided physical recreation facilities for its members, relating to their physical fitness and thereby their work productivity, and the Internal Revenue Service has ruled that the facilities constituted a proper exempt activity of the union, may union members be denied deduction for a part of their dues which the union treated as relating to the recreation facilities?

2. If so, may a deduction be denied to a member who has never used the facilities and particularly one who physically could not use the facilities but nevertheless must belong to the union and pay the dues to keep his job?

3. Do building fund certificates issued in exchange for the payment of union dues have an ascertainable fair market value so as to preclude a business deduction for the dues?

LIST OF PARTIES

The caption of the case in this Court contains the names of all parties to this proceeding.

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I. OPINIONS OF COURTS BELOW

The opinion of the United States Tax Court is reported at 75 T.C. 465 (1980). The opinion of the Ninth Circuit is reported at 694 F.2d 614 (1982).

II. GROUNDS FOR JURISDICTION

The Ninth Circuit entered judgment on December 10, 1982. The petitioners file this Petition for Writ of Certiorari within 90 days of this date pursuant to 28 U.S.C. § 2101(c) and Rule 20 of the Supreme Court Rules.

III. STATUTES AND REGULATIONS INVOLVED

Internal Revenue Code § 162:

> "(a) In General.--There shall be allowed as a deduction all the ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business, . . . "

Internal Revenue Code § 262:

> "PERSONAL, LIVING, AND FAMILY EXPENSES.
>
> "Except as otherwise expressly provided in this chapter, no deduction shall be allowed for personal, living, or family expenses."

Income Tax Regulations:

> "§ 1.162-15(c) Dues. Dues and other payments to an organization, such as a labor union or a trade association, which otherwise meet the requirements

> of the regulations under section 162, are deductible in full."

The applicable portions of Internal Revenue Code § 83 and the regulations thereunder are set forth in the Appendix, infra.

IV. STATEMENT OF THE CASE

The petitioners received statutory notices of deficiency from the Internal Revenue Service claiming that they had underpaid their taxes because portions of their union dues did not qualify as business expenses under Section 162 of the Internal Revenue Code. The petitioners brought this action in the Tax Court, claiming that they were entitled to a deduction for their union dues.

The petitioners are residents of and work in Alaska. The petitioner Briggs, during 1975, was employed by Sealand Freight Services in Anchorage. As a

condition of his employment, he was required to be a member of Local 959 of the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America ("the union"). This union covers the entire state of Alaska. The petitioner Hurbi, for part of 1976, worked for ITT Arctic Services and was stationed 70 miles from Fairbanks. He, too, was required to be a member of the union while working for that employer.

To maintain good standing with the union, members were required to pay fixed monthly dues, as well as additional dues for each hour of work. The monthly dues were paid personally by the members, while the hourly dues were deducted from the members' paychecks by their employers and transmitted directly to the union. The dues were deposited into the union's general bank account. For internal accounting purposes, a computer

classified a portion of the dues in the general bank account as "working dues (recreation)". The amount of dues received by the union classified as "working dues (recreation)" was $2,939,474.60 in 1975 and $3,288,466.00 in 1976.

During 1975 and 1976 the union's Executive Board decided on and authorized recreation centers to be constructed. Although there was never a vote of the union membership on the centers, an increase in dues starting in July, 1974, was explained as being for recreation centers. Recreation centers were built in both Anchorage and Fairbanks and were opened in 1977. The facilities included handball-racquetball courts, tennis courts, swimming pools, jogging tracks, exercise rooms, and the like.

The Anchorage recreation center to date is an investment of $8,870,937,

including land, building, and equipment. The Fairbanks recreation center to date is an investment of $6,282,280, including land, building, and equipment. Of this cost, $5,203,218 has been financed through the general fund of the union, and $9,950,000 has been financed through borrowing. The loans are being repaid from the general fund of the union.

The Internal Revenue Service has ruled that the funding and operation of this recreational program by Local 959 is an exempt function under Section 501(c)(5) of the Internal Revenue Code.

Neither the petitioners nor any members of their families have ever used either of the recreation centers. At the time these centers opened and to the present, Hurbi has been stationed at Sparrevohn, 350 miles from Fairbanks and 200 miles from Anchorage. Mr. and Mrs. Briggs live approximately six miles

from the Anchorage facility.

In 1975, the union allocated $474.84 of Briggs' hourly dues to "working dues (recreation)". In 1976, the union allocated $285.53 of Hurbi's hourly dues to "working dues (recreation)". The Commissioner of Internal Revenue disallowed deduction of these dues. The Tax Court agreed with the Commissioner and the Ninth Circuit affirmed.

In a manner similar to the recreation dues, a portion of the members' dues was allocated to a union building program. For each $50 of union dues so designated, the union issued a certificate to the member. This certificate certified that $50 of the union dues paid by the holder had been deposited in the Teamsters Local 959 Building Fund. The certificate stated that it was not transferable and expressly gave no interest in union assets. It stated that the Executive

Board of the union would administer the building program. Upon determining that the building program was completed, the Executive Board would recommend a program to the membership providing for redemption of all outstanding certificates, including a recommendation as to what interest rate could be paid. Upon approval of the membership, the certificates would be redeemed. It provided further that earlier redemption might be secured in case the holder left the jurisdiction of the union or retired, and if at the time he were eligible for an honorable withdrawal card, or if he died, the union would redeem the certificate without interest.

From the hourly dues deducted from Briggs' wages in 1975, the union credited $95.01 to the building fund. From the hourly dues deducted from Hurbi's wages in 1976, the union credited $57.11 to the

building fund. The Commissioner disallowed deduction of these dues. The Tax Court agreed with the Commissioner and the Ninth Circuit affirmed.

V. ARGUMENT FOR ALLOWANCE OF WRIT

This case raises important questions of federal law which have not been, but should be, settled.

The first question raised is whether Section 262 of the Internal Revenue Code applies to deny a deduction for union dues when the dues are used by the union to provide recreation facilities, a proper tax-exempt function of the union, relating to the improvement of the overall physical well-being of its members and thereby their work productivity. The petitioners contend that it is inconsistent with the ordinary meaning of and congressional intent behind Section 262 to deny an employee a

deduction for union dues having the effect of increasing work productivity.

The question is important because millions of employees are potentially affected. Exercise has increasingly been recognized as vitally linked to work productivity. See "Keeping Fit in the Company Gym", 92 Fortune 136-143 (Oct. 1975); Bucher and Engleburt, "Exercise is Plain Good Business", Reader's Digest 127-30 (Feb. 1976). Many employers, in recognition of the fact that it is in their interest to do so, have taken steps to ensure that their employees receive a minimum amount of exercise. Labor unions have also played a role with regard to providing exercise facilities because it is not feasible for employers who employ small numbers of people to build facilities of their own. In Alaska the need for facilities is especially great because the harsh climatic conditions

severely limit most forms of outdoor exercise. It is anticipated that as recognition of the connection between work and exercise grows, an ever-increasing number of employees will be affected by union-provided recreation facilities.

Essentially, the petitioners contend that taxwise they should be treated the same as employees whose employers directly finance their exercise by building facilities for them. Tax treatment should not differ depending on whether it is the employer or whether it is a labor union which constructs the facilities. In both situations, it is the employer who finances the construction, although the financing is indirect when a labor union is involved. A labor union becomes involved when both the employer and union recognize that it is not practical for a particular

employer to provide facilities. The union negotiates a wage increase from a number of employers and through union dues collects an amount to build the facilities itself. Employees should not be "taxed" in one situation (as a result of being denied a deduction for their dues) when, on the other hand, there is no tax effect to them if the employer directly provides the facilities.

The petitioners submit that when providing recreation facilities for union members is a proper tax-exempt activity relating to improvement of the physical well-being of its members and thereby increasing their work productivity, then Section 262 has no application.

If the Court determines that Section 262 applies generally, then the petitioners argue that Section 262 has no application to a person who receives no personal benefit.

This case represents the first time that a union member has been denied a business deduction for his union dues on the basis that the dues are a personal expense even though no personal benefit is obtained or, in the case of Hurbi, could be obtained by the union member.

The petitioners were required to belong to the union and to pay their union dues to hold their jobs. The union decided to spend part of the dues on recreation centers for which the petitioners had no use. In fact, Hurbi lived hundreds of miles away from the nearest facility and thus could not use the facilities. Nevertheless, the Internal Revenue Service disallowed deduction of the dues allocated to recreation.

This issue has far-reaching implications. Labor unions are a pervasive force in the United States

today. Union members number in the millions. The dues the members pay are generally not voluntarily paid. They are paid because they are a requirement of holding a particular job. Once paid, an individual union member has no control over how his union dues are spent. Dues might be spent by unions on any of a number of items that would give personal benefit to some union members. It is one thing to deny a business deduction to a member who receives personal benefit as a result of the payment of his dues but it is another thing to deny a deduction to a person who receives no personal benefit or who is in such a position that no personal benefit can ever be received. Because a vast number of people are potentially affected by unions and how the unions spend their dues, this question of federal tax law should be settled by this Court.

At the heart of this question is the "business vs. personal" interplay of Sections 162 and 262 of the Internal Revenue Code. This Court has had occasion to consider the interaction between these two sections or their predecessors (see, e.g., Fausner v. Commissioner, 413 U.S. 838 (1973); United States v. Correll, 389 U.S. 299 (1967); Commissioner v. Stidger, 386 U.S. 287 (1967); Commissioner v. Flowers, 326 U.S. 465 (1946)) but has never examined the role of Section 262 when no personal benefit is received by the person seeking the deduction or when the person seeking the deduction is in such a position that personal benefit cannot be received.

The cases which apply Section 262 to deny a deduction involve situations where the personal expense which is incurred results in the receipt, either actual or vested, of personal benefit, by the

person seeking the deduction. In Fausner v. Commissioner, supra, the taxpayer for his payment obtained a ride to work. In United States v. Correll, supra; Commissioner v. Stidger, supra, and Commissioner v. Flowers, supra, the taxpayers for their payments received meals or lodging. Section 262 has application when such personal benefit results because its purpose is to disallow deductions for expenditures which defray the costs of day-to-day living. Section 262 should have no application when no personal benefit is received or when a person is in such a position that no personal benefit can be obtained.

The Tax Court treated the situation as similar to a voluntary organization like a tennis club where a member may not have use for certain facilities but still pays his dues. However, a member in a

voluntary club may withdraw his membership if he does not wish to pay dues. The union members here had no such privilege.

The petitioners submit that the treatment of union dues used for recreation facilities should be consistent with the treatment given union dues paid into a fund to provide strike benefits. As the Tax Court indicated in its opinion in this case (75 T.C. at 468), the Internal Revenue Service allowed the deduction of union dues allocated to a strike fund. It is the Internal Revenue Service's position that strike benefits, although they might not constitute "wages", are includible in income in the year of receipt. Revenue Ruling 68-424, 68-2 C.B. 419. This approach allows a deduction for the payment of union dues, and, if at a later point in time personal benefit results

from such payment, the taxpayer is taxed at that time.

To construe Section 262 as denying a deduction for compulsory union dues because the union uses the dues to improve the health of other members of the union is contrary to the ordinary meaning of and congressional intent underlying that section. It was designed to deny deduction for expenses which resulted in personal benefit to the taxpayer or his family, not to compulsory business expenses used, without his consent or control, to benefit others.

The Ninth Circuit, in addition to its disallowance of a deduction for union dues allocated to the recreation fund, also affirmed the Tax Court's disallowance of the portion of the dues designated by the union as "building fund" dues. The rationale for the decision was that the building fund

certificates received by the union members, evidencing their payment of these dues, had value, and, since the members received something in return for their payment, they were not entitled to a deduction.

It is the petitioners' contention that, based upon the policy of Section 83 of the Internal Revenue Code, the record shows that they have not received property rights of such nature and value as to justify a holding that they have received personal benefit offsetting the "building fund" portion of the dues. The Tax Court's finding in this regard, which finding was affirmed by the Ninth Circuit, is clearly erroneous.

We respectfully request that the Court accept this petition and ultimately rule for the petitioners in this case.

DATED: February 28, 1983.

LeSOURD, PATTEN, FLEMING,
HARTUNG & EMORY

By
F.A. LeSourd

Robert M. Kane, Jr.

Attorneys for Petitioners

APPENDIX

1. Opinion of United States Court of Appeals for the Ninth Circuit.

2. Opinion of United States Tax Court.

3. Applicable portions of Section 83 of the Internal Revenue Code and related Income Tax Regulations.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

CARL & RUTH BRIGGS AND RAYMOND J. HURBI,	)	
Petitioners-Appellants,	)	NO. 81-7094
vs.	)	OPINION
COMMISSIONER OF INTERNAL REVENUE,	)	
Respondent-Appellee.	)	

Appeal from the United States
Tax Court

Argued and Submitted March 5, 1982

Before: KENNEDY, FARRIS AND NORRIS, Circuit Judges.

NORRIS, Circuit Judge:

Briggs and Hurbi (taxpayers) appeal from a judgment of the United States Tax Court, 75 T.C. 465, that union dues paid by the taxpayers and allocated for construction of recreation centers and distribution to a building fund were not deductible under I.R.C. § 162(a)(1976). We affirm.

Compulsory dues providing personal benefits to union members are non-deductible, see Rev. Rul. 78-128, 1978-1 C.B. 39, and the determination of personal and business expenses turns on the purpose of the payments, see Rev. Rul. 81-192, 1981-31 C.B. 50. Thus, the payments in dispute are not deductible because they were distributed into a fund intended to benefit union members personally. An individual union member's inability or unwillingness to take advantage of the benefits does not change the fact that the dues are used to provide personal benefits for union members.

Taxpayers rely in part on Revenue Ruling 54-190, 1954-1 C.B. 46 for their contention that, because the dues allocated for the construction of the recreation centers are compulsory union assessments resulting in no actual or

vested personal benefit to them individually, the dues are deductible as ordinary and necessary business expenses. That ruling, however, involves the deductibility of contributions to private pension plans, which have been given special tax treatment, Kosmal v. Commissioner, 670 F.2d 842 (9th Cir. 1982); Hogan v. United States, 513 F.2d 170, 175 (6th Cir. 1975), and is not relevant here. Compare Rev. Rul. 54-190, supra, with Rev. Rul. 72-463, 1972-2 C.B. 93 (portion of compulsory union dues used to provide death benefits were non-deductible personal expenses).

We also find no merit in appellants' contentions that the recreation center dues are deductible because a union will not lose its tax exempt status by providing recreation. The deductibility of a union member's dues has never been

determined by the status of the union under I.R.C. § 501(c)(5)(1976).

With respect to the deductibility of building fund dues, taxpayers argue that redeemability of the building certificates issued in exchange for dues paid was so contingent that the certificates had no ascertainable fair market value and, therefore, were not investments. As the Tax Court was not clearly erroneous in finding that the certificates had value [E.R. at 45], the taxpayers cannot deduct the building fund dues.[1/] See Parkside, Inc. v. Commissioner, 571 F.2d 1092, 1094-95 (9th Cir. 1977).

AFFIRMED.

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1. We need not decide if taxpayers may deduct the amount, if any, by which the dues paid exceed the certificates' value as taxpayers failed to raise this issue.

FILED
December 30, 1980

UNITED STATES TAX COURT

CARL & RUTH BRIGGS and RAYMOND J. HURBI, Petitioners,	)	Docket Nos. 1473-78 5978-78
v.	)	O P I N I O N
COMMISSIONER OF INTERNAL REVENUE, Respondent.	)	

SIMPSON, Judge: The Commissioner determined a deficiency of $306.87 in the Federal income tax of Carl and Ruth Briggs for 1975 and a deficiency of $298.05 in the Federal income tax of Raymond J. Hurbi for 1976. The only issue to be decided is whether the petitioners were entitled to deduct under section 162(a) of the Internal Revenue Code of 1954[1/] the entire amounts of

1. All statutory references are to the Internal Revenue Code of 1954 as in effect during the years in issue.

the dues paid to a labor union when some of such dues were allocated by the union to a building fund for which the members received redeemable certificates and to a fund for the construction of recreational facilities for the members.

All of the facts have been stipulated, and those facts are so found.

The petitioners, Carl and Ruth Briggs, husband and wife, maintained their legal residence in Alaska when they filed their petition in this case. The petitioner, Raymond J. Hurbi, maintained his legal residence in Alaska when he filed his petition. Mr. and Mrs. Briggs filed their joint Federal income tax return for 1975, and Mr. Hurbi filed his individual Federal income tax return for 1976, with the Internal Revenue Service Center, Ogden, Utah.

During 1975, Mr. Briggs was employed by Sealand Freight Services (Sealand) in

Anchorage, Alaska. As a condition of his employment, he was required to be a member of Local 959 of the International Brotherhood of Teamsters, Chauffeurs, Warehousemen, and Helpers of America (Local 959 or the union). During 1976, Mr. Hurbi was employed by ITT Arctic Services (ITT) into July, and by RCA Alaska Communications through the end of the year, and was stationed 70 miles from Fairbanks, Alaska. He, too, was required to be a member of Local 959 while working for ITT.

To maintain good standing with Local 959, members were required to pay fixed monthly dues as well as additional dues for each hour of work. The monthly dues were paid personally by the members, while the hourly dues were deducted from the members' paychecks by their employers and transmitted directly to the union. On December 17, 1963, Local 959 adopted a

plan whereby 3 cents of the hourly dues of each member was specially allocated to a union building fund. It was agreed that for each $50 collected from a member for the building fund, the member would receive a "BUILDING FUND OWNERS CERTIFICATE" which certified "that Fifty Dollars ($50.00) of the Union dues paid by the holder hereof has been deposited to . . . Local 959 Building Fund." By their terms, the certificates were redeemable with interest (no rate was specified) at the completion of the building program. They were also redeemable without interest when the holder died or, if he was eligible for an honorable withdrawal card from the union, when he retired or left the jurisdiction of Local 959. The certificates stated that they were not transferable and that they did not constitute an interest in the assets of Local 959.

With its building fund, Local 959 constructed or purchased buildings in Anchorage, Kenai, Juneau, and Valdez, Alaska, which were used principally for union offices. At the time of trial, the union was seeking to organize other industries in Alaska, and if successful, it will need more office space. Also, an old building in Juneau will probably have to be replaced in the near future. The union has not yet declared its building program completed.

In July 1974, Local 959 began seeking an increase of 15 cents in the hourly dues deducted by employers when it renegotiated collective bargaining contracts. The union planned to spend the increase to construct recreation centers in Anchorage and Fairbanks for its members. In 1974, planning for the centers was begun, and in that year, the employees of Sealand approved a new

collective bargaining contract in which the increase in hourly dues was included. In 1975, the employees of ITT approved a new collective bargaining contract in which the increase was included. The union collected $2,939,474.60 in 1975 and $3,288,446 in 1976 from the increase in dues.

The recreation centers in Anchorage and Fairbanks were built during 1976 and 1977. On May 22, 1977, the centers opened. Each had tennis courts, handball courts, locker rooms, exercise rooms, saunas, steam rooms, a jogging track, swimming pool, child care center, pro shop, gymnasium, and other facilities. At the time of trial, the total cost of the recreation centers was $15,153,217, of which $5,203,218 had been paid by the union, and the balance had been borrowed.

A union member received and maintained eligibility to use the

recreation centers by accumulating "recreation hours," that is, hours of work for which the 15-cent recreation dues were subtracted from pay. A member received his first month of eligibility by accumulating 300 recreation hours, and he received 1 additional month for every additional 80 hours accumulated. After the first month, a member could also pay $30 to obtain 1 month of eligibility if he did not have sufficient recreation hours. Such eligibility rules were formulated by the union in 1977; prior to that time, Mr. Briggs and Mr. Hurbi had no vested rights in the recreation centers.

In 1975, Mr. Briggs paid $1,410.21 as dues to Local 959. Of this amount, $144 was monthly dues, and $1,266.21 was payroll deductions. The payroll deductions were allocated on the accounting records of Local 959 as

follows:

Strike fund	$474.84
Recreation centers	474.84
Credit union	221.52
Building fund	95.01

In 1976, $909.12 was withheld as union dues from Mr. Hurbi's wages, and he also paid monthly dues. The payroll deductions were allocated on the accounting records of Local 959 as follows:

Strike fund	$433.24
Recreation centers	285.53
Credit union	133.24
Building fund	57.11

On their Federal income tax return for 1975, Mr. and Mrs. Briggs deducted $1,405.68 for union dues, and on his Federal income tax return for 1976, Mr. Hurbi deducted $1,239.61 for union dues. In his notices of deficiency, the Commissioner determined that the monthly dues and the portions of the hourly dues allocated to the strike fund were deductible, but he disallowed the

remainder of the claimed deductions.[2/] The petitioners concede that the portions of the dues allocated to the credit union were not deductible.

The issues to be decided are whether the portions of the dues allocated to the building fund and to the recreation centers were deductible under section 162(a). That section allows a deduction for all the ordinary and necessary expenses incurred in carrying on a trade or business. Section 1.162-1(a), Income Tax Regs., provides that, to be deductible, business expenses must be "directly connected with or pertaining to

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2. In his notices of deficiency, the Commissioner determined that Mr. Briggs' payments to the strike fund totaled $630.84 and that Mr. Hurbi's payments to such fund totaled $441. In amended answers, the Commissioner reduced his determinations to conform to the stipulated facts. In the case of Mr. Hurbi, he also determined that the allowable monthly dues were $144, and Mr. Hurbi has not challenged that adjustment.

the taxpayer's trade or business." The taypayer's employment is his trade or business (Motto v. Commissioner, 54 T.C. 558 (1970); Primuth v. Commissioner, 54 T.C. 374 (1970)), and section 1.162-15(c), Income Tax Regs., provides that "Dues and other payments to an organization, such as a labor union . . ., which otherwise meet the requirements of the regulations under section 162, are deductible in full." The petitioners have the burden of proving that the dues were ordinary and necessary business expenses of their employment. Sanford v. Commissioner, 50 T.C. 823, 826 (1968), affd. per curiam 412 F.2d 201 (2d Cir. 1969), cert. denied 396 U.S. 841 (1969).

We deal first with the dues allocated to the building fund. Since the petitioners were required to pay the dues to maintain their membership in the union, and since they had to be members

of the union in order to hold their jobs, it is clear that the petitioners were required to pay the dues as a condition of their employment.[3] Yet, the Commissioner takes the position that such dues were used to purchase certificates in the building fund and that therefore such dues were not business expenses but were nondeductible savings or investments. On the other hand, the petitioners insist that the certificates were worth substantially less than their face amount, and they argue that under several decisions of this Court, a union member is entitled to deduct the entire amount of the dues unless an asset of approximately equal value is received in return for the payment of the dues. See Cohen v. Commissioner, 63 T.C. 267 (1974),

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3. Although we have not been able to find that Mr. Hurbi was required to be a member of the union while employed by RCA, the parties so assume.

affd. per curiam 543 F.2d 725 (9th Cir. 1976); Megibow v. Commissioner, 21 T.C. 197 (1953), affd. 218 F.2d 687 (3d Cir. 1955); Taylor v. Commissioner, 2 T.C. 267 (1943), affd. sub nom. Miller v. Commissioner, 144 F.2d 287 (4th Cir. 1944).

In support of their conclusion as to the value of the certificates, the petitioners assert on brief that it is unlikely that the union will ever declare the building program ended or that it will pay reasonable interest on the certificates if it does so. They also point out that although an employee is entitled to redeem his certificates when he leaves the union because of retirement or otherwise, he is not entitled to any interest on such a redemption, and they argue that since there is no right to receive reasonable interest on the certificates, their present value is a

good deal less than their face amount. Yet, the only facts in the record concerning the duration of the building program are the stipulated facts that the program has been in progress since 1963, that the union hopes to organize more workers in Alaska and will need more office space if successful, and that an old building in Juneau will probably have to be replaced in the near future. There is no evidence of any definite building plans, and there is no statement by any union official corroborating the petitioners' assertions. On the evidence before us, we cannot find that the building program is unlikely to end. Moreover, even if we were to find that building plans do exist for the next several years, there is no evidence that the building program would not end immediately thereafter or that such plans would not be financed from a new building

program. In addition, there is no indication in the record that the union would not pay a reasonable rate of interest when it redeems the certificates.

The petitioners presented no evidence showing the actual value of the certificates in the building fund or that the value of such certificates was less than the dues allocated to their purchase. It may be that without a guaranteed right of redemption at a reasonable rate of interest, the value of the certificates was less than the price. Nevertheless, the certificate holder is entitled to some return on the certificate, and he may actually realize its full value on redemption. Under such circumstances, the petitioners' dues allocated to the building fund resulted in their acquiring rights of substantial value.

The case law is clear that when a taxpayer makes a payment and receives therefor property of substantial value, he is not entitled to deduct the entire amount, if any part, of such payment. For example, in United States v. Mississippi Chemical Corp., 405 U.S. 298 (1972), the taxpayer, a farm cooperative, borrowed money from one of the banks for cooperatives established under Federal law. In order to receive the loan, the taxpayer was required to purchase stock in the bank at a price greatly exceeding the stock's value. The taxpayer deducted the excess of the price over the value as interest, but the Supreme Court disallowed the entire deduction. The Court reasoned that although the taxpayer made the payment in order to borrow money, the taxpayer had not incurred a deductible expense since the payment was cast in the form of a payment for stock

and since "this stock was endowed with a long-term value." 405 U.S. at 312.

Similarly, in Ancel Green & Co. v. Commissioner, 38 T.C. 125 (1962), and McMillan Mortgage Co. v. Commissioner, 36 T.C. 924 (1961), the taxpayer, a mortgage lender, sold mortgages to the Federal National Mortgage Association. As a condition of each sale, the taxpayer also purchased stock of the association at a price substantially higher than the stock's value. We considered whether the taxpayer was entitled to deduct any part of the payments for the stock. We held that the taxpayer was entitled to a deduction, but we specifically recognized that the deduction was limited to the excess of the price of the stock over its value. 38. T.C. at 129; 36 T.C. at 931.

Finally, in Jordan v. Commissioner, 60 T.C. 872 (1973), affd. per curiam 514 F.2d 1209 (8th Cir. 1975), the taxpayer,

who was one of the promoters of a corporation, purchased stock in the corporation from certain individuals in order to settle litigation brought by the individuals for misrepresentation in the original issuance of stock by the corporation. The taxpayer believed that the purchase price of the stock was substantially greater than the value of the stock, and therefore, he deducted the excess as a business expense relating to the litigation. We found that the purchase price was in fact not in excess of value and that the entire amount was paid for the purpose of acquiring the stock, and we disallowed the deduction. In reaching our decision, we recognized that, in general, when a taxpayer acquires an asset at a price exceeding the value of the asset, he may be entitled to a deduction, but we also recognized that the amount of the

deduction is limited to the excess of price over value. 60 T.C. at 879.

The petitioners' reliance on Cohen, Megibow and Taylor is misplaced. Each of those cases involved the issue of whether an employee of the Federal Government was entitled to exclude from his gross income his mandatory contribution to the Civil Service Retirement and Disability Fund, and in each case, this Court held that the employee was not entitled to such an exclusion. In part, the rationale of those cases was that the present value of pension rights acquired by the employee as a result of his contribution was equal or greater than the amount of the contribution and that, accordingly, the employee had income in the form of the future rights. Cohen v. Commissioner, 63 T.C. at 282-283; Megibow v. Commissioner, 21 T.C. at 200; Taylor v. Commissioner, 2 T.C. at 271. However, the petitioners

read too much into our decisions. Cohen, Megibow and Taylor nowhere indicate that when the present value of property rights received by an employee is exceeded by the amount of the contribution, the employee is entitled to exclude or deduct the entire contribution from income.

In this case, the petitioners acquired valuable certificates in return for the dues allocated to the building fund, and therefore, it is clear that the petitioners did not incur an expense equal to the full amount of dues allocated to the building fund. Under the rationale of Mississippi Chemical, McMillan Mortgage, Ancel Greene, and Jordan, they are not entitled to deduct the entire amount of such dues.[4/]

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4. The petitioners also argue that Rev. Rul. 54-190, 1954-1 C.B. 46, supports their position. That ruling considered the question of whether assessments paid by union members to a

Moreover, here, the petitioners have made no claim for a partial deduction. They have presented no evidence from which we could determine whether, or to what extent, the prices paid for the certificates exceeded their value. On this record, we will express no opinion as to whether a partial deduction would be allowable. Accordingly, we hold that

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pension fund are deductible as a business expense. The ruling held that although the union members receive rights to future income in return for the assessments, the assessments are deductible since "A member must pay his assessments to remain in the union and keep a union job," and since "it does not appear that the personal value of each member's interest in the pension fund ordinarily approximates what he pays into the fund so as to make his assessment payment a personal expense or consideration for an annuity." 1954-1 C.B. at 47. However, IRS appears to have limited that ruling to contributions to pension funds. Thus, in Rev. Rul. 72-463, 1972-2 C.B. 93, it was held that amounts paid by a union member into a union death-benefits fund are personal expenses and therefore nondeductible.

the petitioners have not shown that they were entitled to deduct the dues allocated to the building fund.

We deal next with whether the dues allocated to the recreation centers were deductible. To begin, there is no doubt that if Mr. Briggs or Mr. Hurbi had simply paid money, individually, to build recreation facilities for personal use, such amounts would have constituted personal expenditures which are nondeductible under section 262. Amounts expended by an employee to maintain his health and well being are personal expenses, even if the expenditures are helpful or even essential to his employment. Smith v. Commissioner, 40 B.T.A. 1038 (1939), affd. per curiam 113 F.2d 114 (2d Cir. 1940); see also Carroll v. Commissioner, 51 T.C. 213 (1968), affd. 418 F.2d 91 (7th Cir. 1969); Yeomans v. Commissioner, 30 T.C. 757

(1958); Bruton v. Commissioner, 9 T.C. 882 (1947). The Commissioner contends that, in like manner, the dues allocated to the recreation centers were personal expenditures and not deductible.

The Treasury regulations interpret section 162(a) to allow a deduction for union dues, but the deduction is restricted to the dues which constitute business expenses within the meaning of that section. Sec. 1.162-15(c), Income Tax Regs. Over the years, the Internal Revenue Service has issued several rulings in which the Service has repeatedly held that union dues are deductible, but those rulings have expressly held that a deduction is not allowed for dues which constitute a personal expense. For example, I.T. 2888, XIV-1 C.B. 54 (1935), held that union assessments used to provide medical, accidental, and death benefits

are personal expenses and therefore nondeductible. Similarly, Rev. Rul. 69-214, 1969-1 C.B. 52, stated that a payment by a union member is not deductible if such payment "serves to defray an expense of a personal nature." The issue in the ruling was whether a fine paid by a union member to a union is a deductible business expense, and the ruling held that such a payment is not personal and therefore is deductible. Finally, Rev. Rul. 72-463, 1972-2 C.B 93, reiterated the position of I.T. 2888 in holding that union assessments used to provide death benefits are nondeductible personal expenses. In disallowing a deduction for personal expenses, such rulings are consistent with the Code and regulations, and they establish a longstanding administrative practice which is entitled to special weight in construing and applying section 162(a).

United States v. Correll, 389 U.S. 299 (1967); McMenamy v. Commissioner, 54 T.C. 1057 (1970), affd. 442 F.2d 359 (8th Cir. 1971).

The petitioners take the position that the dues were business expenses since Mr. Briggs and Mr. Hurbi were required to pay the dues to keep their jobs. It is true that Sealand and ITT required the petitioners to be members in good standing of Local 959. Yet, Mr. Briggs and Mr. Hurbi had union votes equal to those of the other members, and so far as the record discloses, the union was in no way compelled by law or other authority to build recreation centers. The union was but an organization of individuals, and through it, individuals expended money on a variety of goods and services, including recreation centers. The mere fact that an organization, and not individuals, expended money on the

recreation centers cannot convert personal expenses into business expenses. The situation is no different from that of neighbors who pool their resources to build a common tennis court or similar structure; their expenditures are not rendered business expenses merely because they have joined together. Local 959, although not a purely voluntary organization, was nevertheless controlled by its members; having decided to make personal expenditures through the union, the members cannot now claim that their dues so allocated were business expenses.

Moreover, if the petitioners' argument were adopted, the union could provide its members with housing, food, and other personal facilities and include the costs thereof as a part of the union dues; as a result, the members would be allowed a deduction for virtually all their personal expenses. Such a result

would clearly distort the purpose of section 162(a), and it makes clear that lines must be drawn--the deduction for union dues cannot be extended to cover personal expenses.

Next, the petitioners argue that in 1975 and 1976 when the dues were collected, they had no right to the use of the recreation centers since the officials of Local 959 were not under a binding obligation at that time to build the recreation centers; therefore, they conclude that such dues could not have constituted expenditures for their personal benefit when they were collected. However, whether or not union officials were obliged in some sense to build recreation centers, it is a fact that dues were allocated to them, and so far as the record discloses, the dues would not have been increased in 1974 and 1975 had it not been for the plan to

build the centers. Moreover, the union, of course, was controlled ultimately, not by its officials, but by its members, and its members ultimately decided how to spend its revenues. If elected officials had not gone forward with the centers, the members could have replaced the officials.

Finally, the petitioners maintain that, because of the location of the recreation centers and because of the eligibility rights established by the union for their use, each member of the union did not have an equal right to the use of the centers and that each member did not receive a right which equaled the value of the dues allocated to the recreation centers. It is true that the location of the centers or the eligibility requirements may prevent some members of the union from deriving any benefit from the centers; on the other

hand, the value of the benefits received by other members may far exceed their dues allocated for that purpose. In any event, the dues allocated for the construction of the recreation centers were used for the personal benefit of the union members in the aggregate, and such dues were not used by the union to carry out its responsibilities for the maintenance of the members' employment or for the improvement of their conditions of employment. Accordingly, we conclude and hold that the dues allocated to the construction of the recreation centers were not an ordinary and necessary business expense within the meaning of section 162(a) and are not deductible.

Internal Revenue Code § 83(a):

"PROPERTY TRANSFERRED IN CONNECTION WITH PERFORMANCE OF SERVICES.

"(a) General Rule.--If, in connection with the performance of services, property is transferred to any person other than the person for whom such services are performed, the excess of--

"(1) the fair market value of such property (determined without regard to any restriction other than a restriction which by its terms will never lapse) at the first time the rights of the person having the beneficial interest in such property are transferable or are not subject to a substantial risk of forfeiture, whichever occurs earlier, over

"(2) the amount (if any) paid for such property,

shall be included in the gross income of the person who performed such services in the first taxable year in which the rights of the person having the beneficial interest in such property are transferable or are not subject to a substantial risk of forfeiture, whichever is applicable. The preceding sentence shall not apply if such person sells or otherwise disposes of such property in an arm's length transaction before his rights in such property become transferable or not subject to a substantial risk of forfeiture."

Income Tax Regulations:

"§ 1.83-1. Property transferred in connection with the performance of services.

"(a) Inclusion in gross income--(1) General rule. Section 83 provides rules for the taxation of property transferred to an employee or independent contractor (or beneficiary thereof) in connection with the performance of services by such employee or independent contractor. In general, such property is not taxable under section 83(a) until it has been transferred (as defined in § 1.83-3(a)) to such person and become substantially vested (as defined in § 1.83-3(b)) in such person. In that case, the excess of--

"(i) The fair market value of such property (determined without regard to any lapse restriction, as defined in § 1.83-3(i)) at the time that the property becomes substantially vested, over

"(ii) The amount (if any) paid for such property,

shall be included as compensation in the gross income of such employee or independent contractor for the taxable year in which the property becomes substantially vested. Until such property becomes substantially vested, the transferor shall be regarded as the owner of such property, and any income from such property received by the employee or independent contractor (or

beneficiary thereof) or the right to the use of such property by the employee or independent contractor constitutes additional compensation and shall be included in the gross income of such employee or independent contractor for the taxable year in which such income is received or such use is made available. This paragraph applies to a transfer of property in connection with the performance of services even though the transferor is not the person for whom such services are performed."

§ 1.83-3(e):

"(e) Property. For purposes of section 83 and the regulations thereunder, the term "property" includes real and personal property other than money or an unfunded and unsecured promise to pay money in the future. The term also includes a beneficial interest in assets (including money) which are transferred or set aside from the claims of creditors of the transferor, for example, in a trust or escrow account. . . . "

Office-Supreme Court, U.S.
FILED
APR 20 1983
ALEXANDER L. STEVAS,
CLERK

No. 82-1497

In the Supreme Court of the United States

OCTOBER TERM, 1982

CARL BRIGGS, ET UX. AND RAYMOND J. HURBI, PETITIONERS

v.

COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

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MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

Petitioners[1] seek review of the decision below[2] in this federal income tax case holding that the portions of their union dues that were allocated to construction of recreation centers, and to a building fund (in return for which petitioners received conditionally redeemable "building fund owners certificates"), were not deductible as ordinary and necessary business expenses under Section 162(a) of the Internal Revenue Code of 1954 (26 U.S.C. (& Supp. V)).

The pertinent facts may be summarized as follows: Petitioner Briggs, during 1975 (the taxable year at issue with respect to him), was employed in Anchorage, Alaska. Petitioner Hurbi, during 1976 (the taxable year at issue with

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[1]References to "petitioners" are to Carl Briggs and Raymond J. Hurbi. Ruth Briggs is a party to this case solely because she filed a joint return with Carl Briggs for 1975.

[2]The decision of the court of appeals is reported at 694 F.2d 614.

respect to him), was employed 70 miles from Fairbanks, Alaska. As a condition of their employment, petitioners had to be members in good standing of Local 959 of the International Brotherhood of Teamsters, Chauffeurs, Warehousemen, and Helpers of America. To remain in good standing with Local 959, petitioners were required to pay specified monthly and hourly dues. The hourly dues, which are the only ones involved in this case, were deducted by the employers from the members' paychecks and remitted directly to the union (Pet. App. A-6 to A-7).

In 1974 and 1975, the employees of the companies for whom petitioners worked approved new collective bargaining contracts calling for, *inter alia*, a 15-cent increase in hourly union dues, to be used for construction of recreation centers in Anchorage and Fairbanks (Pet. App. A-9 to A-10). The centers were completed in 1977 at a cost of approximately $15 million, of which approximately $5 million had been paid directly by the union, and approximately $10 million had been borrowed. Each center was equipped with a swimming pool, tennis courts, handball courts, steamrooms, saunas, and other facilities (Pet. App. A-10).

Local 959 also used some of the hourly dues for its building fund plan. Under this plan, each union member paid 3 cents per hour into a fund to be used for the construction of union buildings, and received in exchange a "building fund owners certificate" in the face amount of $50 for each $50 he had so paid. Although generally nontransferable, this certificate could be redeemed at face value when the member died or withdrew from the union under honorable circumstances, and could be redeemed with interest (at a then-unspecified rate) at the completion of the union's building program (Pet. App. A-7 to A-9).

In 1975, petitioner Briggs paid $474 that was allocated to the recreation centers, and $95 that was allocated to the building fund. In 1976, petitioner Hurbi paid $285 that was

allocated to the recreation centers, and $57 that was allocated to the building fund. Petitioners deducted these sums on their tax returns as business expenses (Pet. App. A-11 to A-12). On audit, however, the Commissioner disallowed these deductions (Pet. App. A-12 to A-13).

In this proceeding brought by petitioners for redetermination of the deficiencies, the Tax Court upheld the Commissioner (Pet. App. A-5 to A-32). With respect to the dues allocated to the construction of the recreation centers, the Tax Court found that they "were used for the personal benefit of the union members in the aggregate, and * * * not * * * to carry out [the union's] responsibilities for the maintenance of the members' employment or for the improvement of their conditions of employment" (Pet. App. A-32), and thus held that they did not constitute ordinary and necessary business expenses. With respect to the building fund dues, the Tax Court held that because petitioners had received valuable certificates in return for those dues, they constituted nondeductible capital expenditures (Pet. App. A-14 to A-25). The court of appeals affirmed (Pet. App. A-1 to A-4).

1. The decision below correctly held that the portion of petitioners' union dues allocated to the construction of recreation centers was not deductible.

Section 162(a) of the Internal Revenue Code of 1954 (& Supp. V) allows as a deduction "all the ordinary and necessary expenses paid or incurred * * * in carrying on any trade or business * * *," and Section 262 of the 1954 Code prohibits any deduction for "personal, living, or family expenses." Under these provisions, a taxpayer's expenditures for improvement of his personal appearance or physical condition are personal expenses, and thus nondeductible,

even where they arise from a job-related requirement.[3] It is therefore plain that the recreation center dues here, which were assessed by the union for the purpose of constructing athletic facilities for the after-hours diversion of its members, constitute nondeductible personal expenditures.

Petitioners contend (Pet. 12-17) that it was unlikely that petitioner Hurbi would ever use the facilities, because he lived a significant distance from either one,[4] and for that reason alone Hurbi should have been allowed his claimed deduction. But it is the union's purpose in making the expenditures in question, and the relation of that purpose to the members' performance of the duties of their employment, that controls the question of deductibility (see I.T. 2888, 14-1 Cum. Bull. 54, 56 (1935), position restated in Rev. Rul. 72-463, 1972-2 Cum. Bull. 93). Here, it is clear that the union's purpose was to confer a personal, non-job-

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[3]See *Sparkman* v. *Commissioner*, 112 F.2d 774, 777-778 (9th Cir. 1940) (denture expenses of an actor held nondeductible, although his purchase of the dentures was necessitated solely by his employment as an actor); *Drake* v. *Commissioner*, 52 T.C. 842 (1969) (haircut expenses of a soldier held nondeductible, although his frequent haircuts were necessitated by the Army's requirement that he have a haircut every two weeks); Rev. Rul. 78-128, 1978-1 Cum. Bull. 39 (health spa expenses incurred by a law enforcement officer held nondeductible, although one of the requirements of his job was that he maintain excellent physical condition). See also Rev. Rul. 72-463, 1972-2 Cum. Bull. 93 (portion of union members' dues used to provide funds for payment of death benefits is not deductible because it serves to defray an expense of a personal nature); Rev. Rul. 81-192, 1981-2 Cum. Bull. 50 (amounts withheld from employees' wages to fund private disability benefits plans are nondeductible personal expenses, even though the withholding was mandatory).

[4]In 1976, the tax year at issue with respect to Hurbi, he was stationed 70 miles from Fairbanks (Pet. App. A-7). In 1977, the year the recreation centers were completed, Hurbi was stationed at Sparrevohn, 200 miles from Anchorage (Pet. 6).

related benefit on its members (Pet. App. A-32). Accordingly, the recreation dues involved here were nondeductible, and the Commissioner was not required to make an exception for each union member who contended that he was unable to take advantage of the recreation centers that the union was building on its members' behalf. Cf. *Pevsner* v. *Commissioner*, 628 F.2d 467 (5th Cir. 1980), rehearing denied, 636 F.2d 1106 (5th Cir. 1981) (boutique manager's required expenditures for purchase of designer clothing, adaptable for general wear, held nondeductible, although manager, because of her "simple everyday lifestyle," in fact never wore the clothing outside of work).

Petitioners also contend (Pet. 11-12) that since workers whose employers build recreational facilities on their behalf are allegedly not taxed on their proportionate share of the value of those facilities, then, in order to achieve parity of tax treatment between those workers and workers who (through their union) build similar facilities themselves, the latter workers should be entitled to deductions for the sums they pay out for the construction of those facilities. But even assuming that petitioners are correct that where an employer builds elaborate athletic facilities for his employees, the employees are not required to include any amounts in respect thereof in gross income,[5] that fact does not help petitioners' case. Here, petitioners are seeking a *deduction* — not defending against the assertion by the Commissioner of additional gross income. In these circumstances, the taxpayer has the burden of "clearly showing" his right to a deduction. *E.g., Interstate Transit Lines* v. *Commissioner*, 319 U.S. 590, 593 (1943). Thus, the fact that workers with employer-provided athletic facilities might not have to

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[5]But cf. Rev. Rul. 57-130, 1957-1 Cum. Bull. 108 (amount paid by employer for "reconditioning and health-restoring services" rendered by resort hotel to his employee is includable in employee's gross income).

include any amounts in respect of those facilities in gross income has no bearing on the petitioners' claimed deductions here. See 1 B. Bittker, *Federal Taxation of Income, Estates & Gifts* para. 14.1 (1981) ("Fringe benefits that are excluded [from income] under de minimis practice would not be deductible if purchased by employees for themselves * * *").[6]

2. The decision below also correctly held that the portion of petitioners' dues allocated to the building fund was not deductible. As the Tax Court found (Pet. App. A-18), the certificates received by petitioners in exchange for their building fund dues were distinct assets that had substantial ongoing value. Their cost (*i.e.*, the total amount of the building fund dues paid by petitioners) was therefore nondeductible. See *United States* v. *Mississippi Chemical Corp.*, 405 U.S. 298 (1972); *M.F.A. Central Cooperative* v. *Bookwalter*, 427 F.2d 1341 (8th Cir. 1970), cert. denied, 405 U.S. 1045 (1972).[7]

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[6]As petitioners note (Pet. 6, 9, 12), the Internal Revenue Service, in a technical advice memorandum, has ruled that the union's proposed funding and operation of the recreation centers involved here would not jeopardize its status as a labor organization exempt from tax under Section 501(c)(5) of the 1954 Code. Section 501(c)(5) is not in pari materia with Section 162(a) (& Supp. V) (compare Rev. Rul. 62-17, 1962-1 Cum. Bull. 87 (labor organization may, consistent with its Section 501(c)(5) exemption, pay death benefits to its members), with Rev. Rul. 72-463, 1972-2 Cum. Bull. 93 (individual labor union members may not deduct under Section 162 (& Supp. V) the portion of their union assessments that is used to provide funds for the payment of death benefits)). Thus, the Revenue Service's technical advice memorandum has no significance for purposes of the present case. See also, Section 6110(j)(3).

[7]Section 83 of the 1954 Code (& Supp. V), relied on by petitioners (Pet. 19), is inapposite. It deals with the inclusion in gross income of property transferred in connection with the performance of services, and has nothing to do with deductions by employees.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

REX E. LEE
Solicitor General

APRIL 1983

DOJ-1983-04